Agenda
Advisory Committee on
Model Civil Jury Instructions

September 10, 2012
4:00 to 6:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Judicial Council Room, Suite N31

Welcome and approval of minutes	Tab 1	John Young
Introduction of new committee members Judge Ryan Harris and Judge Andrew Stone		John Young
Vicarious liability instructions	Tab 2	John Lund
CV1005. Industry standard.	Tab 3	Paul Simmons Tracey Fowler
CV2016. Survival claim. Disputed cause of death.	Tab 4	Tim Shea
Commercial Real Estate v. Comcast, 2012 UT 49.	Tab 5	Phil Ferguson

Committee Web Page

Published Instructions

Meeting Schedule: Matheson Courthouse, Judicial Council Room, 4:00 to 6:00 unless otherwise stated.

October 9, 2012 (Tuesday)
November 13, 2012 (Tuesday)
December 10, 2012
January 14, 2013
February 11, 2013
March 11, 2013
April 8, 2013
May 13, 2013
September 9, 2013
October 15, 2013 (Tuesday)
November 12, 2013 (Tuesday)
December 9, 2013

Tab 1

MINUTES

Advisory Committee on Model Civil Jury Instructions
June 11, 2012
4:00 p.m.

Present: Diane Abegglen, Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, Honorable Kate A. Toomey, David E. West

Excused: John L. Young, Tracy H. Fowler, Ryan M. Springer

Messrs. Carney and Shea directed the meeting in Mr. Young's absence.

1. *Committee Membership*. Mr. Shea noted that Judge Himonas has resigned from the committee because of his other commitments. Mr. Carney suggested that Judge Ryan Harris be invited to take his place. Judge Toomey moved to adopt the recommendation without a quorum. The motion passed without opposition. Judge Toomey and Mr. Carney will invite Judge Harris to join the committee. Judge Toomey also suggested inviting Judge Todd Shaughnessy. Other suggestions for committee members from the bench were Judge Keith Kelly and Judge Andrew Stone. Judge Shaughnessy is already on the Rules advisory committee (as is Judge Toomey), and Judge Kelly is on the Evidence advisory committee. Judge Toomey and Ms. Blanch volunteered to invite Judge Stone to join the committee. Judge Toomey asked committee members to come to the next meeting prepared to propose names of attorneys who could be added to the committee, particularly those with expertise in the remaining substantive areas to be covered by the instructions.

2. *Minutes*. Mr. Carney moved to adopt the minutes of the May 14, 2012 meeting. Judge Toomey seconded the motion. The minutes were approved.

3. *Vicarious Liability Instructions*. The committee continued its review of the vicarious liability instructions:

a. *CV2814. Independent contractor defined*. Judge Toomey thought the instruction was a correct statement of the law. Mr. West thought that the instruction did not adequately tell the jury what an independent contractor is. Dr. Di Paolo and Mr. Humpherys agreed. They thought the "right of control" was not adequately explained, that a jury could think that if the employer had the right to hire or fire the actor, then he had the right to control the actor's work, and the actor was therefore an employee. Judge Toomey suggested dropping "and control" from the second paragraph and deleting subparagraph (2). Mr. Humpherys noted that an employee has to fill out a form W-4, and the employer is required to withhold taxes for the employee. Mr. West suggested adding language similar to MUJI 1st 25.9, that the most important factor is whether the employer retained the right to control the manner and means of doing the work. Judge Toomey noted that the second paragraph covered that concept. Dr. Di Paolo suggested changing the order of the sentences in the second paragraph.

Mr. Humpherys noted that the term "agent" was not used after the first sentence. Messrs. Carney and Summerill suggested dropping "agent" and explaining the change in a committee note. Mr. Shea asked whether the instruction needed to juxtapose "employee" with "independent contractor," that is, whether it should just define an independent contractor and not confuse the question by trying to distinguish an "employee." Dr. Di Paolo thought the distinction was useful. After further discussion, the committee revised CV2814 to read:

> [Name of defendant] claims that [name of actor] was an independent contractor.
>
> An independent contractor is one who has the right to control the manner and means of accomplishing the work, in his or her own way, subject only to minimal direction, and is responsible only for completing the job satisfactorily.
>
> To decide whether [name of actor] was an independent contractor, you must decide whether [name of defendant] had the right to control the manner and means of accomplishing the work. If you decide that [name of defendant] did, then [name of actor] is not an independent contractor. If you decide that [name of defendant] did not, then [name of actor] is an independent contractor.
>
> You may consider the following factors and weigh them as you think proper:
>
> (1) agreements between the parties about who had the right of direction or control;
> (2) the right to hire and fire;
> (3) the method of payment; and
> (4) who furnished the equipment.

On Judge Toomey's motion (Mr. Summerill 2d), the committee approved the instruction as revised.

b. *CV2815. Liability for independent contractor.* On Judge Toomey's motion (Mr. Summerill 2d), the committee approved CV2815.

c. *CV2815A. Principal controls manner and means of work.* CV2815A is meant to state the law governing the retained control doctrine. At Mr. Carney's suggestion, the title was changed to "Principal retains control over the injury causing aspect of the work." Judge Toomey suggested, "actively

participated in the injury-causing aspect of the work." Mr. Carney noted that in the case of *Gonzalez v. Russell Sorensen Construction,* 2012 UT App 154, the court held that a general contractor who asserted control over the property could be liable under the retained control doctrine. Mr. Shea suggested breaking the instruction up into two parts: (1) actively participated, or (2) exerted control. Judge Toomey asked whether "actively participated" was a form of vicarious liability, or whether it was properly considered liability for one's own negligence. Mr. Carney noted that if "active participation" is removed from the instruction, then the reason needs to be explained in a committee note. Mr. Summerill agreed. Mr. Humpherys suggested adding a note that says that active participation can be the basis for either direct or vicarious liability. Dr. Di Paolo suggested substituting "the part of the work that caused the injury" for "the injury-causing aspect of the work." The committee revised CV2815A to read:

> . . . [name of defendant] is liable for physical harm caused by [name of actor]'s negligence if [name of defendant] exerted so much control over the manner and means of the part of the work that caused the injury that [name of actor] could not carry out that work in [his] own way.

On Judge Toomey's motion (Mr. Summerill 2d), the committee approved the revised instruction.

d. *CV2815B. Principal prohibited from delegating duty.* CV2815B is meant to state the law governing nondelegable duties. Mr. Summerill thought the title was wrong, that it should be "Principal liable for nondelegable duty" or "Employer of an independent contractor is not relieved of liability for delegation of a duty negligently performed." He noted that he had a nondelegable duty instruction in a recent trial, but he could not find it. He suggested striking *Yazd v. Woodside Home Corp.* from the references and adding *Bowen v. Riverton City,* 656 P.2d 454 (Utah 1982); *Price v. Smith's Food & Drug Centers,* 2011 UT App 66, 252 P.3d 365; and *Johnson v. DOT,* 2004 UT App 284, 98 P.3d 773, as references. Mr. Summerill further noted that the doctrine does not prohibit delegation of a duty; it just adds a potentially liable party (the principal). In other words, the principal may remain liable despite having delegated the duty. Mr. Ferguson asked what the jury was supposed to decide, since the question of duty is for the court to decide. In other words, is an instruction even necessary? Messrs. Carney and Humpherys and Judge Toomey did not think so. They thought the instruction was just informational. With that in mind, the committee revised the instruction to read:

> . . . [name of defendant] is liable for physical harm caused by [name of actor's] negligence because I have determined that a [law or contract] imposes liability even though [name of defendant] delegated the duty to perform the part of the work that caused the injury.

At Mr. Ferguson's suggestion, the committee decided to hold the instruction for Mr. Johnson's review.

e. *CV2815C. Inherently dangerous work.* Mr. Carney asked whether it is ever a jury decision to decide whether particular work is "inherently dangerous." Mr. Ferguson thought it almost always is. Dr. Di Paolo asked whether the actor has to be told that the work is inherently dangerous. The committee thought not, but the employer must know or have reason to know of the special danger. Mr. Humpherys asked what the issue was for the jury to decide and whether the instruction needs to define "special danger." Mr. Shea suggested adding, "You must decide whether the work involved a special danger and whether the defendant knew or had reason to know that the special danger was inherent in or normal to the work." Mr. West noted that the committee needs to know whether the special danger doctrine (also called the peculiar risk doctrine) presents a jury question or not. If not, Mr. Shea suggested revising the instruction similar to CV2815B, to read:

> . . . [name of defendant] is liable for [name of actor's] negligence because I have determined that the work involved a special danger that [name of defendant] knew or had reason to know was inherent in or normal to the work.

Mr. Shea suggested having the subcommittee answer the question of whether the doctrine presents a question for the jury. Mr. Carney suggested comparing CV2815C with CACI 3708.

4. *Next Meeting*. There will be no committee meeting in July or August 2012. The next meeting will be Monday, September 10, 2012, at 4:00 p.m. Mr. Humpherys noted that the punitive damage subcommittee is waiting for the Utah Supreme Court to decide a recent punitive damage case before it finishes its work.

The meeting concluded at 6:00 p.m.

Tab 2

Vicarious Liability Instructions

(1) CV 2801. An organization acts through its agents. (Approved)

[Name of party] is a [corporation, partnership, joint venture, etc.] and acts or fails to act when [name of party]’s officers, employees, or agents act or fail to act within the scope of their duties or authority.

References

Zions First Nat. Bank v. Clark Clinic Corp., 762 P.2d 1090, 1094-95 (Utah 1988).

Orlob v. Wasatch Management, 2001 UT App 28, ¶ 18, 33 P.3d 1078.

MUJI 1st Instruction

25.1.

Committee Notes

If the jury must decide whether the defendant is a corporation, partnership, or joint venture, then this instruction should not be given. Or phrased as "If you find that [name of defendant] is …."

(2) CV 2802. Actual authority. (Approved)

[Name of plaintiff] claims that [name of principal] is liable for [describe act or omission] by [name of officer/employee/agent]. To succeed on this claim, [name of plaintiff] must prove that:

(1) [name of principal] granted [name of officer/employee/agent] the authority to [describe actual authority]; or

(2) [name of officer/employee/agent]'s conduct was necessary, usual, proper or incidental to the conduct that [name of principal] actually authorized.

References

Zions First Nat. Bank v. Clark Clinic Corp., 762 P.2d 1090 (Utah 1988)

Bowen v. Olsen, 576 P.2d 862 (Utah 1978)

B & R Supply Co. v. Bringhurst, 28 Utah 2d 442, 503 P.2d 1216 (1972)

Restatement (Third) of Agency Section 3.01

MUJI 1st Instruction

25.2; 25.4.

Committee Notes

The courts have adopted a more specific test in cases involving scope of employment. If the relationship between principal and agent is a traditional employment relationship, the court should use Instruction CV2805. Scope of employment. If the relationship is a traditional principal and agent relationship, the court should use this instruction.

(3) CV 2803. Apparent authority. (Approved)

[Name of plaintiff] claims that [name of principal] is liable for [describe act or omission] by [name of officer/employee/agent]. To succeed on this claim, [name of plaintiff] must prove all of the following:

(1) [name of principal] acted in a way that would cause a reasonable person to believe that [name of principal] consented to or knowingly permitted [name of officer/employee/agent]'s conduct; and

(2) at the time of [name of officer/employee/agent]'s conduct, [name of plaintiff] knew of [name of principal]'s acts; and

(3) [name of plaintiff] did in fact believe that [name of officer/employee/agent] had the authority to [describe act or omission].

However, if [name of plaintiff] knew of the real scope of [name of officer/employee/agents]'s authority in time to avoid the harm, then [name of principal] is not liable for [name of officer/employee/agent]'s conduct.

References

City Elec. v. Dean Evans Chrysler-Plymouth, 672 P.2d 89 (Utah 1983).

Bank of Salt Lake v. Corporation of the President of the Church, 534 P.2d 887 (Utah 1975).

Sutton v. Byer Excavating, Inc., 2012 UT App 28.

Restatement (Third) of Agency, Section 2.03, Comment (e). "To establish that an agent acted with apparent authority, it is not necessary for the plaintiff to establish that the principal's manifestation induced the plaintiff to make a detrimental change in position, in contrast to the showing required by the estoppel doctrines…. Establishing that a plaintiff took an action as a result of the principal's manifestation may also help to establish that the person to whom the manifestation was made believed it to be true. Moreover, the underlying substantive cause of action on which the third party sues the principal may require proof that the plaintiff took a specific type of action. For example, if the underlying cause of action is fraud, it is necessary for the plaintiff to establish that the defendant's misrepresentation led to a detrimental change in position."

MUJI 1st Instruction

25.3.

Committee Notes

(4) CV 2804. Approval of conduct. (Approved)

[Name of plaintiff] claims that [name of principal] is liable for [describe act or omission] by [name of third party] because [name of principal] approved of [name of third party]'s conduct after the fact. To succeed on this claim, [name of plaintiff] must prove that [name of principal] knew of [name of third party]'s conduct; and approved of it.

[Name of plaintiff] may prove that [name of principal] approved of [name of third party]'s conduct by any acts, words, or conduct, including silence, which, under the circumstances, indicate approval.

References

Bradshaw v. McBride, 649 P.2d 74 (Utah 1982).

Bullock v. Utah, Dep't of Transp., 966 P.2d 1215 (Utah Ct.App.1998).

Franklin Credit Mgmt. Corp. v. Hanney, 2011 UT App 213.

MUJI 1st Instruction

25.5.

Committee Notes

(5) CV2805. "Scope of employment" defined. (Approved)

[Name of plaintiff] claims that [name of employer] is liable for [describe act or omission] by [name of employee]. To succeed on this claim, [name of plaintiff] must prove that [name of employee]'s conduct was within the scope of employment. "Scope of employment" means that the conduct:

(1) was of the general kind [name of employee] was [employed/authorized] to do; and

(2) occurred substantially within working hours and within the normal work area; and

(3) was motivated, at least in part, by the purpose of serving [name of employers]'s interest.

References

Helf v. Chevron U.S.A., Inc., 2009 UT 11, ¶ 48, 203 P.3d 962.

Clover v. Snowbird Ski Resort, 808 P.2d 1037 (Utah 1991).

Birkner v. Salt Lake County, 771 P.2d 1053 (Utah 1989).

Sutton v. Byer Excavating, Inc., 2012 UT App 28.

MUJI 1st Instruction

25.6.

Committee Notes

The courts have adopted a more specific test in cases involving scope of employment. If the relationship between principal and agent is a traditional employment relationship, the court should use this instruction. If the relationship is a traditional principal and agent relationship, the court should use <a

href=http://www.utcourts.gov/resources/muji/inc_list.asp?action=showRule&id=28#2802 >Instruction CV2802. Actual authority.

(6) CV 2806. Deviation from scope of employment. (Approved)

If [name of employee] deviates from carrying out [his] employment duties for personal reasons, whether [he] was still acting within the scope of employment depends on the extent of the deviation.

If it was a slight deviation to attend to business other than [name of employer]'s, then the acts are still within the scope of employment.

However, if [name of employee]'s deviation was so substantial that it had no relation to [his] employment or to [name of employer]'s business, then [name of employee]'s acts are not within the scope of employment.

References

Clover v. Snowbird Ski Resort, 808 P.2d 1037, 1042 (Utah 1991).

Carter v. Bessey, 97 Utah 427, 93 P.2d 490, 492 (1939).

Restatement (Third) of Agency. Section 7.07.

MUJI 1st Instruction

25.7.

Committee Notes

(7) CV 2807. Scope of employment; travel to and from work. (Approved)

Traveling to and from work is usually not within the scope of employment. [Name of plaintiff] claims that, [name of employee]'s [describe act or omission] while traveling to or from work is within the scope of employment. To succeed on this claim, [name of plaintiff] must prove that:

(1) [name of employer] benefited from the travel other than just in [name of employee]'s presence at work; or

(2) [name of employer] had control over [name of employee]'s conduct during [his] travel.

References

Ahlstrom v. Salt Lake City Corp., 2003 UT 4, ¶ 6, 73 P.3d 315.

Christensen v Swenson, 874 pd 125 (Utah 1994).

Whitehead v. Variable Annuity Life Ins. Co., 801 P.2d 934 (Utah 1989).

Windsor Ins. Co. v. American States Ins. Co., 22 P.3d 1246, (Utah App.,2001).

27 ALR 5th 174. Employer's liability for negligence of employee in driving his or her own automobile.

MUJI 1st Instruction

25.8.

Committee Notes

Ahlstrom v. Salt Lake City Corp., 2003 UT 4, 73 P.3d 315, includes a thorough discussion of the scope of employment doctrine and of several exceptions to it.

(8) CV 2808. Scope of employment; dual purpose. (Approved)

If [name of employee]'s [describe act or omission] was motivated to benefit [name of employer], then the conduct was within the scope of employment even though [name of employee] was also pursuing some personal interest.

However, if [name of employee]'s primary motivation was personal, then [his] conduct was not within the scope of employment, even though [he] may have also transacted some business or performed some duty related to [his] employment.

[Where [name of employee] is involved in an accident while traveling for [name of employer], you should ask whether the trip was one for which [name of employer] would have had to send another employee to the same destination or to perform the same task if the trip had not been made.]

References

Ahlstrom v. Salt Lake City Corp., 2003 UT 4, ¶ 14, 73 P.3d 315.

Clover v. Snowbird Ski Resort, 808 P.2d 1037, 1041 (Utah 1991).

Whitehead v. Variable Annuity Life Ins. Co., 801 P.2d 934 (Utah 1989).

MUJI 1st Instruction

25.7

Committee Notes

Use the bracketed paragraph only if the case involves the employee's travel.

(9) CV 2809. Scope of employment; intentional act. (Approved)

[Name of employee]'s intentional [describe act or omission] is within the scope of employment if [name of employee]'s conduct:

(1) is of the type that [he] was hired to perform; and

(2) occurred substantially within the authorized time and space limits of [his] employment; and

(3) was at least partly motivated to serve [name of employer]'s interest.

However, if [name of employee]'s conduct was unprovoked, highly unusual, and outrageous, then [name of employee]'s conduct was not within the scope of employment.

References

Clark v. Pangan, 2000 UT 37, 998 P.2d 268.

Birkner v. Salt Lake County, 771 P.2d 1053 (Utah 1989).

MUJI 1st Instruction

25.13.

Committee Notes

(10) CV 2810. Joint venture defined. (Approved)

A joint venture is a relationship voluntarily agreed to by two or more people in which the parties combine their property, money, skill, labor or knowledge and share:

(1) a common goal;

(2) ownership in the [describe subject matter];

(3) the right to control;

(4) the profits; and

(5) any losses, unless there is an agreement to the contrary.

References

Ellsworth Paulsen Const. Co. v. 51-SPR-L.L.C., 2008 UT 28, 183 P.3d 248 (must be evidence to support each element, 183 P.3d 253, n. 2; "loss-sharing" discussed).

Rogers v. M.O. Bitner Co., 738 P.2d 1029 (Utah 1987) (elements of joint venture).

Basset v. Baker, 530 P.2d 1 (Utah 1974).

MUJI 1st Instruction

25.16.

Committee Notes

(11) CV 2811. Liability of [partnership/joint venture] for acts of [partner/joint venturer. (Approved)

[Name of plaintiff] claims that [name of partnership/joint venture] is liable for [describe act or omission] by [name of partner/joint venturer]. To succeed on this claim, [name of plaintiff] must prove that:

(1) [name of partner/joint venturer]'s conduct was within the ordinary course of [name of partnership/joint venture]'s business; or

(2) [name of partner/joint venturer] acted under the [actual / apparent] authority of the [partnership/joint/venture].

References

Utah Code Section 48-1-10 (repealed effective July 1, 2012).

Utah Code Section 48-1b-305.

MUJI 1st Instruction

25.14.

Committee Notes

See also Instruction CV2802 Actual authority, and Instruction CV2803 Apparent authority.

(12) CV 2812. Liability of parents or legal guardians for property damage caused by a minor. (Approved)

[Name of defendant] is the [parent] [legal guardian] of [name of minor]. [Name of defendant] is liable for damage to [name of plaintiff]'s property if you find that:

[(1) [Name of minor] intentionally [damaged, defaced, destroyed, or took] [name of plaintiff]'s property;]

[(2) [Name of minor] recklessly or willfully shot or propelled an object at [name of plaintiff]'s [car, truck, bus, airplane, boat, locomotive, train, railway car, or caboose];] or

[(3) [Name of minor] intentionally and unlawfully tampered with [name of plaintiff]'s property and thereby [recklessly endangered human life] [recklessly caused or threatened a substantial interruption or impairment of any public utility service.]

However, if you find that [name of defendant]:

(1) [made a reasonable effort to supervise and direct [name of minor] or]

(2) [made a reasonable effort to restrain [name of minor] if [name of defendant] knew of [name of minor]'s intended acts in advance]

then [name of defendant] is not liable for any damages.

References

Utah Code Section 78A-6-1113.

MUJI 1st Instruction

25.10.

Committee Notes

The list of vehicles in (2) is a statutory list, and some vehicles are not included. The statute limits the amount of damages; if the damages awarded are greater than allowed, the judge can reduce the amount.

(13) CV 2813. Liability of a person who gives a minor permission to drive his vehicle. (Approved)

If you find that [name of defendant]

[(1) was the owner of the motor vehicle involved in the accident and knowingly permitted [name of minor] to drive the vehicle on a highway, or]

[(2) furnished the motor vehicle to [name of minor],

then [name of defendant] is liable for damages caused by the negligence of [name of minor] in driving the vehicle on a highway.

References

Utah Code Section 53-3-212.

Utah Code Section 53-3-102. Definition of “highway.”

MUJI 1st Instruction

25.22 & 25.23.

Committee Notes

This instruction should be given only if the owner or the person who furnished the motor vehicle did not have security covering the minor's operation of the vehicle in amounts as required under Section 31A-22-304.

(14) CV 2814. Independent contractor defined.

[Name of defendant] claims that [name of actor] was an independent contractor for whose conduct [he] is not responsible.

An independent contractor is one who has the right to control the manner and means of accomplishing the work and does the work in his or her own way, subject only to minimal direction, and is responsible only for completing the job.

In order to determine whether [name of actor] was an independent contractor, you must decide whether [name of defendant] had the right to control the manner and means of accomplishing the work. If you decide that [name of defendant] had the right of control, then [name of actor] is not an independent contractor. If you decide that [name of defendant] did not have the right of control, then [name of actor] is an independent contractor.

In determining whether [name of defendant] had the right of control, you may consider the following factors and weigh them as you think proper:

(1) agreements between the parties about who had the right of control;

(2) the right to hire and fire;

(3) the method of payment;

(4) who was actually directing the work; and

(5) who furnished the equipment.

References

Utah Home Fire Ins. Co. v. Manning, 1999 UT 77, ¶11, 985 P.2d 243.

Thompson v. Jess, 1999 UT 22, 979 P2d 322 (Utah 1999).

Gourdin By & Through Close v. Sharon's Cultural Educ. Recreational Ass'n (SCERA), 845 P.2d 242 (Utah 1992).

Harry L. Young & Sons v. Ashton, 538 P.2d 316, 318 (Utah 1975).

MUJI 1st Instruction

25.9

Committee Notes

(15) CV 2815. Liability for independent contractor.

If [name of actor] was an independent contractor, then [name of defendant] [usually] is not liable for [name of actor]'s negligent acts or omissions.

[However, even if you decide that [name of actor] is an independent contractor … [As applicable, follow with:]

CV 2815A. Principal retains control over manner and means of the injury-causing aspect of the work.

CV 2815B. Principal may remain liable despite delegating duty.

CV 2815C. Inherently dangerous work.]

Committee Note:

Include the bracketed "usually" if the jury will be instructed on one of the circumstances in which the principal is liable for an independent contractor's negligence.

(16) CV 2815A. Principal retains control over manner and means of the injury-causing aspect of the work.

… [name of defendant] is liable for physical harm caused by [name of actor]'s negligence if [name of defendant] exerted so much control over the manner and means

of the part of the work performed by [name of actor] which caused the injury that [name of actor] could not carry out that work in [his] own way.

References

Magana v. Dave Roth Constr., 2009 UT 45, ¶27,215 P.3d 143.

Begaye v. Big D Constr. Corp., 2008 UT 4, ¶¶ 9-10, 178 P.3d 343.

Mallory v. Brigham Young University, 2012 UT App 242.

MUJI 1st Instruction

25.10

Committee Notes

Magana v. Dave Roth Constr., 2009 UT 45, defines “injury-causing aspect of the work” to mean the proximate cause of plaintiff’s harm. See Instruction CV209. "Cause" defined.

This instruction focuses on the defendant controlling the manner and means of the injury-causing aspect of the work, rather than on active participation in the injury-causing aspect because the latter may be grounds for defendant’s direct, rather than vicarious, liability.

(17) CV 2815B. Principal may remain liable despite delegating duty.

… [name of defendant] is liable for physical harm caused by [name of actor]’s negligence because I have determined that [the law or contract] imposes liability even though [name of defendant] delegated the duty to perform the part of the work which caused the injury.

References

Gleason v. Salt Lake City, 94 Utah 1, 74 P.2d 1225 (1937).

Price v. Smith’s Food and Drug Inc., 252 P3d 365 (Utah App 2001).

Bowen v. Riverton City, 656 P2d 434 (Utah 1982).

Johnson v. Dept of Transportation, 98 P3d 773 (Utah App 2004).

MUJI 1st Instruction

25.11

Committee Notes

Magana v. Dave Roth Constr., 2009 UT 45, defines “injury-causing aspect of the work” to mean the proximate cause of plaintiff’s harm. See Instruction CV209. "Cause" defined.

Normally the jury would not be instructed on a question of law, but this instruction may be helpful if the jury must decide whether the harm was caused by breach of a non-delegable duty or some other cause.

(18) CV 2815C. Inherently dangerous work.

… [name of defendant] is liable for [name of actor]'s negligence if the work involved a special danger which [name of defendant] knew or had reason to know was inherent in or normal to the work.

You must decide whether the work involved a special danger and whether [name of defendant] knew or had reason to know was inherent in or normal to the work.

A special danger is a recognizable danger that arises out of the nature of the work or the place where it is done and requires specific safety measures appropriate to the danger. A special danger may also arise out of a planned but unsafe method of doing the work. A special danger does not include a risk that is unusual, abnormal, or not related to the normal or expected risks associated with the work.

References

Thompson v. Jess, 1999 UT 22, 979 P.2d 322, 329 citing Restatement (Second) of Torts §§ 416, 427 (1965).

MUJI 1st Instruction

25.12

Committee Notes

This provision has no application when the injured person is an employee of the independent contractor undertaking the allegedly dangerous work. Thompson v. Jess, 1999 UT 22, 979 P.2d 322, 329 citing Restatement (Second) of Torts §§ 416, 427 (1965).

The committee has no guidance on the definition of a special danger, although the Supreme Court has recognized the principle. This definition is based on the California instruction on this topic. CACI 3708. Peculiar-Risk Doctrine.

Tab 3

(1) CV1005 Industry standard.

In deciding whether the [product] is defective, you may consider the evidence presented concerning the design, testing, manufacture and type of warning for similar products.

References

Tafoya v. Sears Roebuck & Co., 884 F.2d 1330, 1332 (10th Cir. 1989).

Restatement (Third) of Torts, Product Liability §4.

Tab 4

(1) CV2016 Survival claim. Disputed cause of death.

If [name of decedent]'s death was not caused by [name of defendant]'s fault, you may award only [name of decedent]'s economic damages caused by that fault. You may not award noneconomic damages.

References

Utah Code Section 78B-3-107(1)(b).

Committee Notes

This instruction applies only to a claim made under Utah Code Section 78B-3-107(1)(b).

(2) 78B-3-107. Survival of action for injury to person or death upon death of wrongdoer or injured person -- Exception and restriction to out-of-pocket expenses.

(1)(a) A cause of action arising out of personal injury to a person, or death caused by the wrongful act or negligence of another, does not abate upon the death of the wrongdoer or the injured person. The injured person, or the personal representatives or heirs of the person who died, has a cause of action against the wrongdoer or the personal representatives of the wrongdoer for special and general damages, subject to Subsection (1)(b).

(b) If, prior to judgment or settlement, the injured person dies as a result of a cause other than the injury received as a result of the wrongful act or negligence of the wrongdoer, the personal representatives or heirs of the person have a cause of action against the wrongdoer or personal representatives of the wrongdoer for special damages, and general damages not to exceed $100,000, which resulted from the injury caused by the wrongdoer and which occurred prior to death of the injured party from the unrelated cause.

(c) If the death of the injured party from an unrelated cause occurs more than six months after the incident giving rise to the claim for damages, the claim shall be limited to special damages unless, prior to the expiration of the six months, written notice of intent to hold the wrongdoer responsible has been given or is the subject of ongoing negotiations between the parties or persons representing the parties or their insurers.

(2) Under Subsection (1) neither the injured person nor the personal representatives or heirs of the person who dies may recover judgment except upon competent satisfactory evidence other than the testimony of the injured person.

(3) This section may not be construed to be retroactive.

Tab 5

2012 UT 49

IN THE

SUPREME COURT OF THE STATE OF UTAH

COMMERCIAL REAL ESTATE INVESTMENT, L.C.,
Plaintiff and Appellee,
v.
COMCAST OF UTAH II, INC.,
Defendant and Appellant.

No. 20090847
Filed August 10, 2012

Second District, Ogden Dep't
The Honorable Scott M. Hadley
No. 040905266

Attorneys:

Richard W. Jones, Keith M. Backman, Ogden, for plaintiff

Anthony C. Kaye, Matthew L. Moncur, Salt Lake City, for defendant

JUSTICE DURHAM authored the opinion of the Court, in which ASSOCIATE CHIEF JUSTICE NEHRING and JUSTICE PARRISH joined.

JUSTICE LEE filed a concurring opinion.

Having recused himself, Chief Justice Durrant did not participate herein. District Judge Fratto sat, but retired shortly after.

JUSTICE DURHAM, opinion of the Court:

INTRODUCTION

¶1 Comcast of Utah II, Inc. (Comcast) appeals from the district court's grant of partial summary judgment in favor of Commercial Real Estate Investment, L.C. (CRE). The district court awarded CRE approximately $1.7 million in liquidated damages, plus approximately $2 million in interest, based on Comcast's breach of contract. On appeal, Comcast challenges the enforceability of the liquidated damages clause in its contract with CRE. The parties dispute what law governs review of the enforceability of liquidated damages clauses. We hold that liquidated damages clauses are not subject to heightened judicial scrutiny, but instead are treated like any other contractual provision. We reject Comcast's argument that the liqui-

dated damages clause in this contract is unconscionable and further conclude that CRE did not breach its duty to mitigate its damages. We accordingly affirm.

BACKGROUND

¶2 This recitation of facts is based on the district court's undisputed findings of fact for purposes of summary judgment. In 1995, TCI Cablevision of Utah (TCI) approached CRE about "developing a large commercial building where TCI could operate its northern Utah cable television business." TCI proposed to locate a suitable site and design a building to meet its specific needs. CRE would purchase the site and construct the building to TCI's specifications. TCI further proposed to enter into a long-term lease for the building.

¶3 TCI identified a suitable site in Riverdale, Utah. The site was located in a commercial/industrial subdivision that was largely undeveloped. CRE agreed with the proposed site. CRE anticipated that this new building might drive additional development in the subdivision, and consequently acquired another lot adjacent to the TCI lot. But "CRE did not express its intentions regarding adjacent development to TCI."

¶4 TCI's agent prepared the lease and delivered it to CRE. The lease as drafted by TCI's agent contained blanks for the rental amounts and the term of the lease. CRE approved the lease as presented: "The only additions [to the lease] were that the rental amounts and the term had been added. In all other respects, the final lease contained the same provisions as TCI's draft lease."

¶5 The lease contained the following provisions regarding the tenant's duties to continuously operate the building:

> 9.01 Tenant's Business Operations. Tenant covenants to operate all of the Building continuously during the entire term of this Lease with due diligence and efficiency unless prevented from doing so by causes beyond Tenant's control. Tenant shall keep on the Building at all times sufficient personnel to service the usual and ordinary demands and requirements of its customers. Tenant shall conduct its business on the Building during the regular customary days and hours for such type of business in the city or trade area in which the Building is located.

> 9.02 Liquidated Damages. As liquidated damages for the failure of Tenant to comply with the terms of this Article and in addition to all other remedies Landlord may have hereunder, Landlord shall have the right, at its option, to collect not only the minimum and additional rent herein provided, but added rent at the rate of one-thirtieth (1/30th) of the minimum monthly rent set forth in Article 4 for each and every day that Tenant shall fails [*sic*] to conduct its business as required herein.

The lease further specified that CRE had a duty to "exercise its reasonable best faith efforts to mitigate its damages, if any, arising from" a violation of the above provisions.

¶6 The parties signed the lease agreement in July 1995. TCI thereafter took possession and began operating its business from the building. On July 17, 2001, however, TCI ceased operations at the building and vacated the premises. In 2002, Comcast acquired TCI and succeeded to TCI's interest in the property and to its obligations under the terms of the lease. Sometime thereafter, "Comcast listed the building with a realtor in an effort to locate a replacement tenant." "CRE referred any inquiries regarding the property to Comcast's real estate agent, but CRE made no other efforts to find a substitute tenant." A substitute tenant took possession of the property on February 22, 2006.

¶7 TCI (and subsequently Comcast) paid all rent due under the lease since July 1995, but have refused to pay any liquidated damages pursuant to Article 9 of the lease. Not counting interest, liquidated damages from July 17, 2001, to February 22, 2006, total $1,711,990.66.

¶8 In July 2004, CRE sued Comcast for breach of contract and attorney fees. Both parties filed motions for partial summary judgment as to the enforceability of the liquidated damages provision. The parties strongly disagreed as to which case law the district court should apply to determine the clause's validity. CRE argued that enforceability depended only on whether the clause is unconscionable. Comcast countered that enforceability should be determined under section 339 of the first Restatement of Contracts. Both parties supported their respective positions with extensive case law.

¶9 The district court granted CRE's motion for partial summary judgment. The district court first held that our decision in *Reli-*

ance Insurance Co. v. Utah Department of Transportation, 858 P.2d 1363 (Utah 1993), adopted the Restatement test for reviewing liquidated damages clauses. The two-part Restatement test requires determining (1) whether the amount of liquidated damages was a "reasonable forecast" of actual damages and (2) whether actual damages were "incapable or very difficult of accurate estimation." RESTATEMENT OF CONTRACTS § 339 (1932). Applying the Restatement test, the district court held that the clause was enforceable.

¶10 On the first part of the Restatement test, the district court noted that its "deciding factor" was that "the amount of damages varied depending on the length of time the building was unoccupied." Because the lease "specified damages proportional to the length of the breach," the district court reasoned, it could not "find that Comcast has met its burden of establishing that the liquidated damages were not a reasonable forecast of actual damages."

¶11 On the second part, the district court noted that "the parties have offered [it] little guidance on this issue." The court determined that "the issue of unconscionability bears relevance" to this evaluation. As the court found none of the hallmarks of unconscionability to be present, it declined to "reallocate the assumption of the risk that was bargained for between the parties." The court concluded that "Comcast cannot establish that either element of [the Restatement test] is not met, nor can Comcast prove that the agreement is unconscionable," and thus granted CRE's motion for partial summary judgment.

¶12 The district court also rejected Comcast's argument that CRE had failed to mitigate its damages. The district court first noted that it was "undisputed that CRE did nothing to assist in finding a new tenant other than refer inquiries to Comcast's agent." The court then refused to "speculate as to what CRE could have or should have done to secure another tenant or whether any other tenant would satisfy the requirement of occupancy."

¶13 Comcast timely appealed the district court's order. We have jurisdiction under section 78A-3-102(3)(j) of the Utah Code.

STANDARD OF REVIEW

¶14 Summary judgment is appropriate when the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." UTAH R. CIV. P. 56(c). "We review the district court's decision to grant summary judgment for correctness, granting no deference to the district court." *Alliant Techsystems, Inc. v. Salt Lake Cnty. Bd. of*

Equalization, 2012 UT 4, ¶ 17, 270 P.3d 441 (alteration omitted) (internal quotation marks omitted). "We may affirm a district court's entry of summary judgment if it is sustainable on any legal ground or theory apparent on the record." *Haik v. Sandy City*, 2011 UT 26, ¶ 10, 254 P.3d 171 (internal quotation marks omitted).

ANALYSIS

¶15 Comcast challenges two aspects of the district court's grant of partial summary judgment in favor of CRE. First, Comcast argues that the district court erred in evaluating the enforceability of the liquidated damages provision. Second, Comcast contends that the district court erred in not considering CRE's alleged failure to mitigate its damages stemming from Comcast's breach. We consider each of these arguments in turn.

I. ENFORCEABILITY OF LIQUIDATED DAMAGES PROVISION

¶16 On appeal, the parties disagree as to which case law the district court should have applied to determine the validity of the liquidated damages clause. Comcast challenges the district court's decision in three respects: (1) the clause is a penalty on its face and therefore unenforceable, (2) the district court misapplied the Restatement test, and (3) this court should adopt the test laid out in section 356 of the Restatement (Second) of Contracts.

¶17 In response, CRE raises three primary arguments in support of the district court's decision: (1) Comcast did not satisfy its burden of proof to overcome the presumption that the clause was enforceable; (2) the district court correctly applied the Restatement test; and (3) Utah law is unclear regarding the appropriate test for liquidated damages, and this court should clarify that liquidated damages should be evaluated only for unconscionability. We agree with CRE's third point.

¶18 The parties have highlighted a sharp divide in how Utah courts have approached review of liquidated damages clauses. This problem is not unique to Utah. As early as 1854, the New York Court of Appeals observed the following:

> The ablest judges have declared that they felt themselves embarrassed in ascertaining the principle on which the decisions upon [the enforceability of liquidated damages clauses] were founded. They have said that the law relative to liquidated damages has always been in a state of great uncertainty; and that this has

> been occasioned by judges endeavoring to make better contracts for parties than they have made for themselves.

Cotheal v. Talmage, 9 N.Y. 551, 553–54 (1854) (citation omitted). The Supreme Court of Illinois similarly stated that "no branch of the law is involved in more obscurity by contradictory decisions than whether a sum specified in an agreement to secure performance will be treated as liquidated damages or a penalty." *Giesecke v. Cullerton*, 117 N.E. 777, 778 (Ill. 1917); *see also McIntosh v. Johnson*, 31 P. 450, 452 (Utah Terr. 1892) (noting "a great conflict and confusion in the authorities in cases like this"); *Evans v. Moseley*, 114 P. 374, 375 (Kan. 1911) ("There is no branch of the law on which a unanimity of decision is more difficult to find, or on which more illogical and inconsistent holdings may be found."). A century of legal scholarship reflects the same confusion over how courts should approach liquidated damages clauses. *See, e.g.*, Alvin C. Brightman, *Liquidated Damages*, 25 COLUM. L. REV. 277, 277 (1925); Larry A. DiMatteo, *A Theory of Efficient Penalty: Eliminating the Law of Liqudated Damages*, 38 AM. BUS. L.J. 633, 634–35 (2001); William H. Loyd, *Penalties and Forfeitures*, 29 HARV. L. REV. 117, 123 (1915).

¶19 Against this backdrop, we first survey our precedents regarding the enforceability of liquidated damages clauses.

A. Liquidated Damages Clauses Have Been Subject to Varying Standards of Review

¶20 The parties have correctly identified that our case law reflects several competing approaches to evaluating the enforceability of liquidated damages clauses. The tension is apparent in one of the earliest cases considering the enforceability of such clauses. In *Dopp v. Richards*, this court upheld the enforceability of a stipulated forfeiture in the event of breach. 135 P. 98, 100-01 (Utah 1913). The court first looked to whether the damages constituted an unenforceable penalty, which occurs when the damages could "readily and accurately be ascertained" at the time of contract formation. *Id.* at 101. By contrast, the court noted that such provisions likely would be enforceable "[w]here the damages are uncertain in their nature, difficult to ascertain or impossible to be estimated with certainty, . . . and where the parties themselves are . . . better able to compute the actual or probable damages." *Id.* (internal quotation marks omitted). The court then attached a caveat to its reasoning:

> Those statements must, however, be applied subject to the principle of law that, unless the stipulations of a contract are oppressive, unconscion-able, or against public policy, the courts ordinarily will not invade the province of the parties, but will, within well-recognized limits, permit them to determine for themselves what the consequences of a breach of their contracts shall be.

Id.

¶21 Thus, even one of our earliest cases[1] reflects some tension in how to review the enforceability of liquidated damages clauses: on one hand reviewing what can "readily and accurately be ascertained," but on the other deferring to contracting parties absent unconscionability. Our precedents reflect conflicting approaches to evaluating the enforceability of liquidated damages provisions, each of which we discuss in turn.

1. Disfavoring Penalties

¶22 One line of reasoning focuses on whether a contractual provision providing for liquidated damages constitutes a penalty. "It is an elementary principle of law that a provision in a contract between private individuals for a penalty in case of breach of such contract is void." *Croft v. Jensen*, 40 P.2d 198, 202 (Utah 1935). "Whether the provision in the contract is to be construed as an

---

[1] There are three liquidated damages cases that predate *Dopp*. In the first case, the Supreme Court of the Territory of Utah noted that "[t]here is a great conflict and confusion in the authorities in [liquidated damages] cases." *McIntosh*, 31 P. at 452. The court then stated the rule to be as follows:

> When the damages are of that nature that they cannot be reasonably ascertained by evidence, the amount named in the bond shall be taken as the true measure of damages; but where the actual damages can be reasonably arrived at by evidence, the plaintiff, for the breach of the condition of the bond, can recover only the damages actually suffered.

Id. at 453. In the other two cases, the actual damages exceeded the liquidated damages and thus the court did not consider limits on enforcing liquidated damages clauses. *See Donovan v. Hanauer*, 90 P. 569, 572–73 (Utah 1907); *K.P. Mining Co. v. Jacobson*, 83 P. 728, 729 (Utah 1906).

agreement for liquidated damages or for a penalty must be determined by a consideration of the circumstances surrounding the parties at the time of its execution." *Id.* When parties specify liquidated damages in "contracts for the payment of money only," the damages generally are treated as a penalty. *Id.* (internal quotation marks omitted). "The general rule is that, where an agreement imposes several distinct duties or obligations of different degrees of importance, and the same sum is named as damages for the breach of either indifferently, the sum is to be regarded as a penalty." *W. Macaroni Mfg. Co. v. Fiore*, 151 P. 984, 985–86 (Utah 1915). We further noted that if "whether a contract provides a penalty or liquidated damages is in doubt, the contract ordinarily will be regarded as providing a penalty" and thus unenforceable. *Id.* at 986.

¶23 Some of these cases note the tension between strictly reviewing a liquidated damages clause to determine whether it constitutes a penalty, and other approaches employed by this court over the years. *See, e.g.*, *id.* (Frick, J., concurring) ("While, in the absence of fraud or oppression, it is not the province nor the policy of the courts to interfere with competent persons to enter into proper contracts, but to permit them to determine for themselves what the consequences of any breach thereof shall be, yet, in the interest of justice and fairness, the courts have formulated and adopted certain rules by which it is made possible and in most cases practicable, where a specific sum is provided for in case of breach, to determine whether the sum named shall be treated as a penalty or as liquidated damages." (citation omitted)). Furthermore, this line of cases has occasionally treated this approach as essentially another means of evaluating whether a liquidated damages clause is unconscionable. *See, e.g.*, *Croft*, 40 P.2d at 202 ("To permit plaintiff to retain . . . liquidated damages [in this case] . . . is not in accord with equity and good conscience, but is clearly unconscionable.").

2. The Shock the Conscience Test

¶24 Another line of cases compares the amount of liquidated versus actual damages. The key inquiry concerns whether "the amount of liquidated damages bears no reasonable relationship to the actual damage or is so *grossly excessive* as to be entirely disproportionate to any possible loss that might have been contemplated that it *shocks the conscience*." *Warner v. Rasmussen*, 704 P.2d 559, 561 (Utah 1985) (emphases added) (footnote omitted). In reviewing the enforceability of a liquidated damages clause, this court has repeatedly noted that courts should focus on what the

contracting parties knew at the time of contracting. *See, e.g.*, *Dopp*, 135 P. at 101–02. In practice, however, the court seems to have engaged frequently in post hoc weighing. *See, e.g.*, *Bellon v. Malnar*, 808 P.2d 1089, 1096–97 (Utah 1991) (looking to see whether "the amount of [liquidated damages] does not greatly exceed, or is less than, the amount of [actual] damages," then striking down liquidated damages "of over $26,000 in excess of actual damages" as "an unconscionable recovery"); *Soffe v. Ridd*, 659 P.2d 1082, 1084 (Utah 1983) ("In the present case actual damage and liquidated damage amounts are very disproportionate. Liquidated damages of $20,725 do not bear a reasonable relationship to $5,895 actual damages."); *Johnson v. Carman*, 572 P.2d 371, 373 (Utah 1977) ("Although we do not purport to lay down any specific percentage which will be considered unconscionable, to allow the seller to retain the $34,596.10 paid by buyer when seller's actual damages amount to only $25,650.00 would be 'grossly excessive and disproportionate to any possible loss.'"); *Bramwell Inv. Co. v. Uggla*, 16 P.2d 913, 916 (Utah 1932) (noting that liquidated damages clauses are, "as a general rule, enforceable, if the amount stipulated is not disproportionate to the damages actually sustained").

¶25 Significantly, almost all of the cases applying "shock the conscience" analysis note that such amounts are unconscionable, although they appear to be using that term to refer only to *substantive* unconscionability. *See, e.g.*, *Young Elec. Sign Co. v. Vetas*, 564 P.2d 758, 760 (Utah 1977). Indeed, some cases characterize the "shock the conscience" inquiry as simply equivalent to unconscionability analysis. *See, e.g.*, *Jacobson v. Swan*, 278 P.2d 294, 298-99 (Utah 1954) (noting that "relief can be granted only where the facts clearly demonstrate that to enforce [a liquidated damages clause] would be unconscionable"). And conversely, our court has used the "shock the conscience" language in describing the unconscionability inquiry. *See, e.g.*, *Woodhaven Apartments v. Washington*, 942 P.2d 918, 925 (Utah 1997) (noting that the court must find the disparity between liquidated and actual damages "shock[s] the conscience or produce[s] a profound sense of injustice before there can be a determination of unconscionability"). To complicate matters, some cases characterize the "shock the conscience" analysis as another way of identifying when a liquidated damages clause is a penalty. *See, e.g.*, *Jacobson*, 278 P.2d at 298.

3. The Restatement of Contracts Test

¶26 The first Restatement of Contracts lays out the following test for evaluating liquidated damages clauses:

> An agreement, made in advance of breach, fixing the damages therefor, is not enforceable as a contract and does not affect the damages recoverable for the breach, unless
>
> > (a) the amount so fixed is a reasonable forecast of just compensation for the harm that is caused by the breach, and
> >
> > (b) the harm that is caused by the breach is one that is incapable or very difficult of accurate estimation.

RESTATEMENT OF CONTRACTS § 339(1) (1932). These two factors are evaluated as of the time of contract formation, not breach. *See, e.g.*, *Reliance Ins. Co. v. Utah Dep't of Transp.*, 858 P.2d 1363, 1367, 1369 (Utah 1993). *But see* RESTATEMENT OF CONTRACTS § 339 cmt. e (noting that a liquidated damages clause is not enforceable if the breach "causes no harm at all," even if the parties believed at the time of contract formation that the harm was "incapable or very difficult of accurate estimation").

¶27 The three most recent Utah Supreme Court cases to consider liquidated damages have all done so pursuant to section 339 of the first Restatement of Contracts. *See Reliance Ins.*, 858 P.2d at 1366–67 ("In determining the validity of a liquidated damages provision, this court has adopted section 339 of the Restatement of Contracts." (citing *Robbins v. Finlay*, 645 P.2d 623, 626 (Utah 1982); *Perkins v. Spencer*, 243 P.2d 446, 450–51 (Utah 1952))); *see also Bair v. Axiom Design, L.L.C.*, 2001 UT 20, ¶ 24, 20 P.3d 388 (quoting the test as stated in *Reliance Insurance*); *Woodhaven Apartments*, 942 P.2d at 921 (same). In *Reliance Insurance*, the court cited to two cases, *Robbins* and *Perkins*, in support of its statement that section 339 had already been adopted. In *Robbins*, however, this court merely asserted that the court had relied on section 339 in *Johnson* and *Perkins*. *See* 645 P.2d at 626 (citing *Johnson*, 572 P.2d 371; *Perkins*, 243 P.2d 446). Neither *Johnson* nor *Perkins*, however, supports the proposition that this court had officially *adopted* the Restatement's test.

¶28 Neither *Johnson* nor *Perkins* actually relied on section 339. Instead, each case conducted a separate analysis and then noted that section 339 was "in accord" with existing Utah precedent. *Johnson*, 572 P.2d at 373; *Perkins*, 243 P.2d at 450. In fact, before *Reliance*

Insurance, no Utah case had analyzed a liquidated damages clause by employing section 339's two-part approach. Out of more than thirty-five liquidated damages cases reaching the Utah Supreme Court, only the six referenced above have even cited the first Restatement of Contracts.[2]

4. Deference to Contracting Parties

¶29 Another line of cases defers to parties' freedom to contract where the parties have fairly bargained for liquidated damages. Cases in this line usually start with the longstanding principle of contract law that "courts ordinarily will not invade the province of the parties . . . to determine for themselves what the consequences of a breach of their contracts shall be." *Dopp*, 135 P. at 101.This court has stated that "[p]eople should be entitled to contract on their own terms without the indulgence of paternalism by courts in the alleviation of one side or another from the effects of a bad bargain," and that parties "should be permitted to enter into contracts that actually may be unreasonable or which may lead to hardship on one side." *Carlson v. Hamilton*, 332 P.2d 989, 990–91 (Utah 1958); *accord Park Valley Corp. v. Bagley*, 635 P.2d 65, 67 (Utah 1981).

¶30 Cases employing this approach emphasize the role of general contractual remedies (such as mistake, fraud, duress, or unconscionability) as the checks on liquidated damages provisions.

> In the absence of fraud or imposition, the parties are bound by the price or measure of value they have agreed on, and such price must be paid notwithstanding it may be excessive. The courts cannot supervise decisions made in the business world and grant relief when the bargain proves improvident.

Cole v. Parker, 300 P.2d 623, 626 (Utah 1956). We have similarly emphasized the "right of persons to contract freely and to make real and genuine mistakes when their dealings are at arms' length." *Park*

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[2] Nor has this court officially endorsed section 356 of the Restatement (Second) of Contracts. We have cited section 356 only on two occasions. The first citation, appearing in a concurring opinion, supported only the "principal reason for the validity of provisions for liquidated damages" in general. *Soffe*, 659 P.2d at 1086 (Oaks, J., concurring). The second citation noted only that section 356 is in accord with several prior Utah cases on liquidated damages. *Madsen v. Anderson*, 667 P.2d 44, 47 (Utah 1983).

Valley, 635 P.2d at 67. And we have noted that "to be enforceable, a liquidated damages provision must not be a product of unfairness resulting from disparate bargaining positions, a lack of access to pertinent information, or anomalies in the bargaining process, such as those posed by monopolies, duress, or contracts of adhesion." *Robbins*, 645 P.2d at 626 (footnote omitted).

¶31 Cases employing this approach have at times emphasized unconscionability as the primary check on liquidated damages provisions. *See, e.g.*, *Themy v. Seagull Enters., Inc.*, 595 P.2d 526, 529 (Utah 1979) (noting that liquidated damages clauses are enforceable "unless amounts retained as liquidated damages are so great as to be unconscionable, or in the nature of a penalty"); *Biesinger v. Behunin*, 584 P.2d 801, 803 (Utah 1978). In *Carlson v. Hamilton*, the court made this point with particular force:

> It is only where it turns out that one side or the other is to be penalized by the enforcement of the terms of a contract so unconscionable that no decent, fairminded person would view the ensuing result without being possessed of a profound sense of injustice, that equity will deny the use of its good offices in the enforcement of such unconscionability.

332 P.2d at 991. In fact, the court noted that the "spirit" of *Perkins* "calls for adhesion to a principle that equity historically has indulged[]—that it abhors unconscionability shocking to such degree that the function of equity would be misconceived and misapplied by the enforcement of such unconscionability, even though it may have been the subject of contract." *Id.* at 990. In contrasting the facts in *Carlson* with those in *Perkins*, the court noted that "[t]he two cases are poles part, the one obviously being punctuated by unconscionability, the other appearing to call only for" a reasonable amount of damages. *Id.* Certain language in *Perkins* supports such a characterization. *See* 243 P.2d at 451 ("It is true that [nullifying a liquidated damages provision] should be done only with great reluctance and when the facts clearly demonstrate that it would be unconscionable to decree enforcement of the terms of the contract. This is such a case.").

¶32 This court has on several occasions explicitly noted the tension between focusing on the right to contract and subjecting liquidated damages clauses to stricter scrutiny. *See, e.g.*, *Andreasen v. Hansen*, 335 P.2d 404, 407 (Utah 1959) (laying out the "shock the conscience" rule, then noting in the next sentence that "it is to be

kept firmly in mind, that the courts recognize the rights of parties freely to contract and are extremely reluctant to do anything which will fail to give full recognition to such rights"); *see also Allen v. Kingdon*, 723 P.2d 394, 398 (Utah 1986) (Zimmerman, J., concurring) (noting the conflicting case law as to whether liquidated damages clauses are "carefully scrutinize[d]"). We have not yet provided a clear resolution to this inherent tension.

B. Liquidated Damages Clauses Should Be Reviewed Like Other Contractual Provisions

¶33 The competing approaches outlined above have led to "obscurity by contradictory decisions," *Giesecke*, 117 N.E. at 778, and left "the law relative to liquidated damages . . . in a state of great uncertainty," *Cotheal*, 9 N.Y. at 554. It is no wonder that the district court in this case had difficulty applying our conflicting case law to the dispute between Comcast and CRE. We now clarify the standard that Utah courts should use in evaluating the enforceability of liquidated damages provisions.

¶34 The direct determination whether a liquidated damages clause appears to be a penalty imposes an unnecessary additional check on the enforceability of such clauses. First, it improperly reverses the general presumption that contractual provisions are enforceable. *See, e.g.*, *W. Macaroni Mfg.*, 151 P. at 986. Second, the penalty inquiry is motivated by "the interest of justice and fairness," *id.* (Frick, J., concurring), which can be adequately protected through general contractual remedies. Prior cases' framing of the penalty inquiry as a search for unconscionability reinforces this point. *See, e.g.*, *Croft*, 40 P.2d at 202 (concluding that a penalty would be "clearly unconscionable").

¶35 The "shock the conscience" standard similarly is problematic for a number of reasons. First, cases employing this approach have tended to evaluate the enforceability of liquidated damages clauses with the benefit of hindsight, rather than as of the time of contract formation. The opinions thus tend to contain conclusory statements that the court's conscience was shocked. *See, e.g.*, *Johnson*, 572 P.2d at 373. Additionally, cases using this approach have frequently resulted in split opinions in which the majority and dissent sharply disagree regarding the post hoc weighing. *Compare, e.g.*, *id.* ("Although we do not purport to lay down any specific percentage which will be considered unconscionable, to allow the seller to retain the $34,596.10 paid by buyer when seller's actual damages amount to only $25,650.00 would be grossly excessive and disproportionate to any possible loss." (internal quotation marks

omitted)), *with id.* at 374 (Ellett, J., dissenting) ("[In *Carlson v. Hamilton*, the] court refused to allow recovery on the ground that a loss of [9.5 percent] was not enough to be shocking to the conscience. If [9.5 percent] is not shocking, how can [2.2 percent] be considered so?"). Finally, cases employing this approach have repeatedly conditioned enforceability on the court's conclusion that a given liquidated damages clause is not unconscionable. *See, e.g.*, *Jacobson*, 278 P.2d at 299 (noting that, in applying the shock the conscience test, "relief can be granted only where the facts clearly demonstrate that to enforce [a liquidated damages clause] would be unconscionable"). Thus application of general contractual analysis, including the doctrine of unconscionability, would adequately safeguard the interests sought to be protected through the shock the conscience approach. *Cf. Woodhaven Apartments*, 942 P.2d at 925 (noting that the court must find the disparity between liquidated and actual damages "shock[s] the conscience or produce[s] a profound sense of injustice before there can be a determination of unconscionability").

¶36 The Restatement test raises similar concerns. First, as noted above, this court has only recently applied the Restatement test directly—and only after mistakenly concluding that this court had already adopted the test. *See supra* ¶¶ 26–28. Second, as the district court noted in this case, the Restatement test "presents somewhat of a Hobson's choice," a point illustrated by other jurisdictions' struggles in applying this approach. *See, e.g.*, *Arrowhead Sch. Dist. No. 75, Park Cnty. v. Klyap*, 79 P.3d 250, 258 (Mont. 2003) (noting that the two-pronged approach can be "circular and subjective"). The first part of the Restatement test requires a "reasonable forecast" of actual damages, yet the second part requires actual damages to be "incapable or very difficult of accurate estimation." RESTATEMENT OF CONTRACTS § 339. It is hard to comprehend how courts can evaluate the reasonableness of a forecast made when actual damages are nearly impossible to estimate at the time of contract formation. As the comments to the Restatement note, enforcement of liquidated damages clauses is intended to "save[] the time of courts, juries, parties, and witnesses and reduce[] the expense of litigation." *Id.* § 339 cmt. c. The Restatement test, however, actually *encourages* litigation regarding the reasonability of the forecast and the difficulty of estimating the harm.

¶37 Finally, this court has found unconscionability in almost every case in which we have declined to enforce a liquidated damages clause. *See Bellon*, 808 P.2d at 1097. *But see Woodhaven*

Apartments, 942 P.2d at 925 ("[O]ur determination that the contract provision is unenforceable does not necessarily mean that such provision was unconscionable. There must be sufficient evidence to find unconscionability and in this case such is lacking."). Indeed, cases applying one of the other three approaches to evaluating liquidated damages clauses note that the court's underlying goal is to avoid enforcement of *unconscionable* liquidated damages clauses. *See, e.g.*, *Croft*, 40 P.2d at 202; *Jacobson*, 278 P.2d at 299; *Woodhaven Apartments*, 942 P.2d at 920–21 (applying Restatement test after first noting that the court has "'uniformly held [a liquidated damages clause] to be unenforceable'" where "'enforcement of the [clause] would allow an unconscionable and exorbitant recovery'" (quoting *Perkins*, 243 P.2d at 449–50)); *see also Perkins*, 243 P.2d at 453 (Wolfe, C.J., concurring) (noting that section 339 "works out in requiring . . . that the amount demanded as liquidated damages be conscionable").

¶38 We now hold that liquidated damages clauses should be reviewed in the same manner as other contractual provisions. "Persons dealing at arm's length are entitled to contract on their own terms without the intervention of the courts for the purpose of relieving one side or the other from the effects of a bad bargain." *Biesinger*, 584 P.2d at 803. "It is not our prerogative to step in and renegotiate the contract of the parties." *Peck v. Judd*, 326 P.2d 712, 717 (Utah 1958). Instead, unless enforcement of a liquidated damages clause would be unconscionable, "we should recognize and honor the right of persons to contract freely and to make real and genuine mistakes when the dealings are at arms' length." *Id.* "Courts . . . should not interfere except when sharp practice or most unconscionable result[s] are to be prevented." *Id.* Courts should invalidate liquidated damages clauses "only with great reluctance and when the facts clearly demonstrate that it would be unconscionable to decree enforcement of the terms of the contract." *Perkins*, 243 P.2d at 451.

¶39 Comcast argues that, by reviewing liquidated damages clauses only for unconscionability, this court would allow parties to "effectively stipulate to permit punitive damages in the event of breach." We disagree. Reviewing liquidated damages clauses for unconscionability still preserves challenges to penalty clauses. Even our cases purporting to apply the penalty approach conclude that penalties are unenforceable because they are unconscionable. *See, e.g.*, *Croft*, 40 P.2d at 202. Furthermore, our case law employing the penalty approach looks at "the circumstances surrounding the

parties at the time of [the contract's] execution," *id.*—the same inquiry we engage in for claims of unconscionability.

¶40 Thus we clarify that liquidated damages clauses are not subject to any form of heightened judicial scrutiny. Instead, courts should begin with the longstanding presumption that liquidated damages clauses are enforceable. *See, e.g.*, *Bair*, 2001 UT 20, ¶ 25. A party may challenge the enforceability of a liquidated damages clause only by pursuing one of the general contractual remedies, such as mistake, fraud, duress, or unconscionability. *See, e.g.*, *Buckner v. Kennard*, 2004 UT 78, ¶ 57, 99 P.3d 842; *Res. Mgmt. Co. v. Weston Ranch & Livestock Co.*, 706 P.2d 1028, 1043 (Utah 1985).

C. The Liquidated Damages Clause in This Case Is Enforceable

¶41 Comcast challenges the enforceability of the liquidated damages clause in its contract with CRE. The burden lies with Comcast in challenging the enforceability of the clause. *See Ryan v. Dan's Food Stores, Inc.*, 972 P.2d 395, 402 (Utah 1998) ("A party claiming unconscionability bears a heavy burden."); *Res. Mgmt. Co.*, 706 P.2d at 1043 (noting, after first laying out the standards for evaluating unconscionability, that "a duly executed written contract should be overturned only by clear and convincing evidence"); *see also, e.g.*, *Bair*, 2001 UT 20, ¶ 25 (noting the burden is on the party seeking to invalidate a liquidated damages clause). As we have previously noted, the burden properly rests on the party challenging the clause's enforceability because "the purpose of a liquidated damages provision is to obviate the need for the nonbreaching party to prove actual damages." *Bair*, 2001 UT 20, ¶ 25.

¶42 "In determining whether a contract is unconscionable, we use a two-pronged analysis." *Ryan*, 972 P.2d at 402. "The first prong—substantive unconscionability—focuses on the agreement's contents. The second prong—procedural unconscionability—focuses on the formation of the agreement." *Id.* But "substantive unconscionability alone may support a finding of unconscionability." *Id.*

¶43 "Procedural unconscionability focuses on the negotiation of the contract and the circumstances of the parties." *Id.* at 403. The key inquiry is "whether there was overreaching by a contracting party occupying an unfairly superior bargaining position." *Id.* We have laid out six factors bearing on procedural unconscionability. *Id.* In this case, however, Comcast does not allege procedural unconscionability. Nor could it, as Comcast (through its predecessor) drafted the contract in its entirety, including the liquidated damages clause, and presented the contract to CRE for its

approval. Thus *none* of the hallmarks of procedural unconscionability are present in this case.

¶44 "Substantive unconscionability focuses on the contents of an agreement, examining the relative fairness of the obligations assumed." *Id.* at 402 (internal quotation marks omitted). It is not sufficient for the liquidated damages clause to be "unreasonable or more advantageous to one party." *Id.* Instead, "we consider whether a contract's terms are so one-sided as to oppress or unfairly surprise an innocent party or whether there exists an overall imbalance in the obligations and rights imposed by the bargain according to the mores and business practices of the time and place." *Id.* (alteration and internal quotation marks omitted).

¶45 There are no signs of substantive unconscionability with respect to the liquidated damages clause in this contract. Although the clause may be "more advantageous" to CRE, it is not "so one-sided as to oppress" Comcast—particularly where Comcast stands in the shoes of the party that drafted the clause in the first instance. Nor do we find the contractual amount of liquidated damages unreasonable as compensation for a breach of the contractual duty to continuously operate the building. Although Comcast now argues that over $1.7 million in liquidated damages is "grossly disproportionate" to CRE's actual damages, this type of post hoc weighing does not bear on the question of substantive unconscionability, which focuses on the "relative fairness of the obligations assumed" at the time of contracting. "All that appears is that [Comcast] over-obligated [itself] and perhaps made an improvident bargain, but the courts cannot supervise decisions made in the business world and provide relief in this instance." *Park Valley*, 635 P.2d at 68.

II. DUTY TO MITIGATE DAMAGES

¶46 Comcast also argues that CRE failed to mitigate its damages stemming from Comcast's failure to continuously operate the building. Comcast raises two arguments on this issue: (1) the district court erroneously considered Comcast to be a unique tenant under the contract and (2) CRE's efforts (if any) to mitigate were insufficient to satisfy its duty to mitigate damages. CRE counters that its efforts were sufficient to satisfy its duty and that Comcast has failed to meet its burden to present evidence of what CRE could have done to further mitigate damages. We agree with CRE.

¶47 As previously noted, CRE had a contractual duty to "exercise its reasonable best efforts to mitigate its damages" from

Comcast's breach. The general duty to mitigate requires a landlord "to take such steps as would be expected of a reasonable landlord letting out a similar property in the same market conditions." *Reid v. Mut. of Omaha Ins. Co.*, 776 P.2d 896, 907 (Utah 1989). We have noted that "the objective commercial reasonableness of mitigation efforts is a fact question that depends heavily on the particularities of the property and the relevant market at the pertinent point in time." *Id.*

¶48 Significantly, however, "the burden of proving plaintiff has not mitigated its damages and that its award should be correspondingly reduced is on defendant." *John Call Eng'g, Inc. v. Manti City Corp.*, 795 P.2d 678, 680 (Utah Ct. App. 1990). In order to survive summary judgment, Comcast therefore needed to offer some evidence that "would have allowed the court to submit the issue to the jury." *Id.* at 680–81. Instead, Comcast has done nothing but repeatedly assert in briefing and oral argument that CRE "clearly could have done more" to mitigate its damages. It is undisputed, however, that "CRE referred any inquiries regarding the property to Comcast's real estate agent." We thus disagree with Comcast's assertion that "the record plainly indicates that CRE did nothing more than sit on its hands and allow liquidated damages to accrue."

¶49 Comcast offered no evidence to the district court as to how CRE could have further mitigated its damages. Comcast thus failed to carry its burden. We therefore affirm the district court's conclusion that CRE did not breach its duty to mitigate.[3]

CONCLUSION

¶50 Liquidated damages clauses are not subject to heightened judicial scrutiny. Instead, such clauses are presumed enforceable, although they may be challenged on the same equitable grounds as other contractual provisions. We conclude that no such grounds exist to invalidate the liquidated damages clause in the contract between Comcast and CRE. We further hold that Comcast did not carry its burden with respect to challenging CRE's alleged failure to mitigate its damages. We therefore affirm the district court's grant

[3] We agree with Comcast that the district court erred in treating Comcast as a unique, irreplaceable tenant. The district court stated that "the contract specified particularly that [Comcast] was to occupy the building." The contract does not so designate Comcast as a unique or irreplaceable tenant. In light of Comcast's failure to satisfy its burden, however, we nonetheless affirm the district court's decision on this point, albeit on alternate grounds.

of partial summary judgment in CRE's favor and remand for further proceedings consistent with this opinion.

JUSTICE LEE, concurring in part and concurring in the judgment:

¶51 I concur in the court's decision upholding the enforceability of the liquidated damages clause at issue in this case, but write separately because I disagree with its basis for doing so. The court today makes a useful clarification of the legal standard that applies in evaluating the enforceability of liquidated damages provisions. But in my view it errs in going further—in repudiating the standard for assessing liquidated damages clauses set forth in the Restatement (First) of Contracts and repeatedly endorsed by this court.[1] I would affirm that standard (after clarifying it in the way the court does) instead of repudiating it in favor of an ill-defined inquiry into unconscionability.

¶52 On an important threshold point, I agree with the court's conclusion that our liquidated damages cases stand in need of clarification. *Supra* ¶ 20. As the court has ably explained, our liquidated damages precedents have employed a range of different standards. Prior to our adoption of the Restatement test in 1993, our cases seemed to be in conflict and no standard was uniformly employed. *Supra* ¶¶ 20–33. We resolved much of the conflict in adopting the Restatement test, however. The problem that remained in our prior case law is one the court corrects today—the tendency to "evaluate the enforceability of liquidated damages clauses with the benefit of hindsight, rather than as of the time of contract formation." *Supra* ¶ 36. As the court notes, such post-hoc review is problematic for various reasons, *supra* ¶ 36, not the least of which is its potential to inject arbitrariness and unpredictability into a field in which contracting parties need a sound basis for reliance.

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[1] This court first recognized the Restatement approach in *Perkins v. Spencer*, where we characterized it as in accord with our existing case law. 243 P.2d 446, 450-51 (Utah 1952). Even then, however, a standard similar to the Restatement had already been in use for decades in Utah. *See McIntosh v. Johnson*, 31 P. 450, 453 (Utah Terr. 1892) ("When the damages are of that nature that they cannot be reasonably ascertained by evidence, the amount named in the bond shall be taken as the true measure of damages[.]"); *Dopp v. Richards*, 135 P. 98, 101 (Utah 1913) (indicating that enforceability of liquidation clauses depends on whether damages could "readily and accurately be ascertained" at the time of contract formation or whether "damages are uncertain in their nature" such that "the parties themselves are . . . better able to compute the actual or probable damages").

¶53 I am accordingly in full agreement with a threshold course-correction charted by the majority—its repudiation of the hindsight-based approach followed in some of our cases and clarification that the reasonableness evaluation must be made from the standpoint of the parties at the time they entered into the contract. But I see no reason to take the additional step of abandoning the timeworn Restatement test in its entirety. That test, informed by a wealth of precedent in this state and the many others that have embraced it, provides needed predictability for contracting parties seeking to anticipate the likely enforceability of the terms of their agreement. We should reaffirm that standard (after clarifying it), as there is no good reason to abandon it.

¶54 The imprecisions in our liquidated damages cases are hardly grounds for discarding the Restatement test. The problem is not the Restatement test; it is the notion of post-hoc evaluation of reasonableness. But that approach pre-dates this court's express adoption of the Restatement test in 1993,[2] and the cases decided since then are uniformly consistent. Though few in number, each has relied on the Restatement test. And none has fallen into the error of hindsight-based evaluation of reasonableness.[3] The problem seems comfortably behind us.

¶55 Even before we embraced the Restatement standard in 1993, many of our cases still endorsed a "reasonable forecast" or similar test. Although those cases proceeded to engage in improper post-hoc weighing, some nonetheless appeared to start with the right premise—that the question is whether liquidated damages are "disproportionate to any possible loss *that might have been contemplated*."[4] These cases, therefore, do not demonstrate our court's preference for a different standard so much as they show a failure to

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[2] *See Reliance Ins. Co. v. Utah Dep't of Transp.*, 858 P.2d 1363, 1366–67 (Utah 1993). The court denigrates the *Reliance* court's notion of "adoption" on the ground that the prior cases cited in *Reliance* did not themselves expressly adopt the Restatement. *See supra* ¶¶ 28–29. Whatever the state of the law prior to *Reliance*, however, it seems clear that the court recognized the adoption of the Restatement test in *Reliance* and has been employing it ever since.

[3] *See Bair v. Axiom Design, L.L.C.*, 2001 UT 20, ¶ 24, 20 P.3d 388; *Woodhaven Apartments v. Washington*, 942 P.2d 918, 920–23 (Utah 1997); *Reliance*, 858 P.2d at 1367, 1369.

[4] *Warner v. Rasmussen*, 704 P.2d 559, 563 (Utah 1985) (emphasis added).

apply accepted principles correctly.[5] The proper reaction, then, is not to throw out the cases in their entirety, but to correct the error in application. The court has now done that, and we need not go further.

¶56 The supposed internal inconsistency in the Restatement standard, *see supra* ¶ 37, is also no reason to abandon it. The criticism put forward by the court on this score rests on a misunderstanding of the law. Properly understood, there is no incompatibility between the two prongs of the Restatement inquiry.

¶57 The reasonable forecast inquiry is the core standard under the Restatement; the difficulty of estimation element is subsidiary and explanatory. Nothing about that latter element in any way renders the core legal inquiry "'circular.'" *Supra* ¶ 37 (quoting *Arrowhead Sch. Dist. No. 75, Park Cnty. v. Klyap*, 79 P.3d 250, 258 (Mont. 2003)). Courts and commentators have long resolved any apparent difficulty in comprehending "how courts can evaluate the reasonableness of a forecast made when actual damages are nearly impossible to estimate at the time of contract formation," *supra* ¶ 37: When damages are difficult to estimate at the time of contract formation, a liquidated sum is more likely to be deemed reasonable (and vice-versa).[6] That's the whole point of the Restatement's two-

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[5] *See id*. (applying the "reasonable forecast" standard by evaluating the forfeiture based on its "comparison to the actual damages"); *Jacobson v. Swan*, 278 P.2d 294, 298–99 (1954) (same); *supra* ¶¶ 24–25.

[6] *Metlife Capital Fin. Corp. v. Washington Ave. Assocs.*, 732 A.2d 493, 498 (N.J. 1999) ("Courts began to treat the two-pronged [Restatement] test as a continuum; the more uncertain the damages caused by a breach, the more latitude courts gave the parties on their estimate of damages."); *see Moore v. St. Clair Cnty.*, 328 N.W.2d 47, 50 (Mich. Ct. App. 1982) ("And in proportion as the difficulty of ascertaining the actual damage by proof is greater or less, where this difficulty grows out of the nature of such damages, in the like proportion is the presumption more or less strong that the parties intended to fix the amount." (internal quotation marks omitted) (quoting *Jaquith v. Hudson*, 5 Mich. 123, 138 (1858))); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 356 cmt. b (1981) ("If the difficulty of proof of loss is great, considerable latitude is allowed in the approximation of anticipated or actual harm."); *Luna v. Smith*, 861 S.W.2d 775, 779 (Mo. Ct. App. 1991) (same); Charles J. Goetz & (continued...)

part inquiry; it's a sliding scale, with the degree of deference to the damages liquidated by contract depending on the degree of difficulty of estimating damages in advance. Thus, the Restatement test presents not a "'Hobson's choice,'" *supra* ¶ 37, but a helpful clarification of the standard that has long governed the enforceability of liquidated damages clauses in Utah and elsewhere.

¶58 I would thus retain that standard and apply it in this case, as neither the parties nor the court have identified any persuasive reason to abandon it. And even if I were of a mind to jettison this test, I would not replace it with the undefined standard of "unconscionability" adopted by the court today. *Supra* ¶ 39. I am, of course, on board with the general principle of freedom of contract. It's hard to argue with the "right of persons to contract freely and to make real and genuine mistakes when the dealings are at arms' length," much less with the notion that it is not the prerogative of the courts "'to step in and renegotiate the contract of the parties,'" *supra* ¶ 39 (quoting *Peck v. Judd*, 326 P.2d 712, 717 (Utah 1958)). But those general principles are subject to limited exceptions, which are necessary (as the majority itself acknowledges) to foreclose the availability of "'punitive damages'" for breach of contract, *supra* ¶ 40, which would have the troubling effect of deterring efficient breach.[7] So the question before us is not whether to recognize a general rule favoring the freedom of contract; it is how to define the exception to the general rule in the liquidated damages context.

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[6] (...continued)
Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554, 559–60 (1977) ("[A]s the uncertainty facing the contracting parties increases, so does their latitude in stipulating post-breach damages.").

[7] *Thyssen, Inc. v. S.S. Fortune Star*, 777 F.2d 57, 63 (2d. Cir. 1985) ("[B]reaches of contract that are in fact efficient and wealth-enhancing should be encouraged . . . . The addition of punitive damages to traditional contract remedies would prevent many such beneficial actions from being taken."); *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 445–46 (Del. 1996) (stating that expectation damages increase economic efficiency by incentivizing breach only when the benefits from the breach sufficiently compensate both parties; "Punitive damages would increase the amount of damages in excess of the promisee's expectation interests and lead to inefficient results."); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW, ch. 4 (4th ed. 1992).

¶59 The majority replaces the settled standard adopted in our cases with an undefined "unconscionability" inquiry into whether "the facts clearly demonstrate that it would be unconscionable to decree enforcement of the terms of the contract." *Supra* ¶ 39. Without some elaboration by the court, that standard strikes me as an invitation for arbitrariness in future cases.

¶60 The substantive unconscionability inquiry invites an evaluation of the reasonableness of the substance of the bargain entered into by the parties.[8] If the reasonableness assessment is to be conducted from the standpoint of the parties at the time of formation—as the majority opinion demands, *supra* ¶ 46—then perhaps the analysis will look much like the Restatement "reasonable forecast" inquiry. If that is what the majority has in mind, then today's decision rejecting that standard is at best perplexing. And if the majority has something else in mind (as we must suppose from the court's express repudiation of the Restatement), then the matter is even worse.

¶61 The majority never explains how the substantive unconscionability or fairness of a liquidated damages clause is to be evaluated going forward. It offers only its bottom-line conclusion that "the contractual amount of liquidated damages" is not "unreasonable as compensation for a breach of the contractual duty to continuously operate the building." *Supra* ¶ 46. That fuzzy fairness analysis is an invitation for arbitrariness in judicial decisionmaking.[9] Contracting parties deserve more from the courts. They deserve a workable standard they can rely on and contract

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[8] *See Ryan v. Dan's Food Stores, Inc.*, 972 P.2d 395, 402 (Utah 1998) ("In determining substantive unconscionability, we consider . . . whether there exists an overall imbalance in the obligations and rights imposed by the bargain . . . ." (internal quotation marks omitted)); *Sosa v. Paulos*, 924 P.2d 357, 361 (Utah 1996) (substantive unconscionability "focus[es] on the contents of the agreement, examining the relative fairness of the obligations assumed" (internal quotation marks omitted)).

[9] *See* Evelyn L. Brown, *The Uncertainty of U.C.C. Section 2-302: Why Unconscionability Has Become a Relic*, 105 COM. L.J. 287, 291 (2000) ("Common law definitions of unconscionability are . . . so unclear and inconsistent that they provide little, if any, guidance as to what unconscionability really means.").

around.[10] I see the Restatement standard as providing that predictability and workability. In rejecting it, the court revives the muddle it so helpfully resolved in the first part of its opinion. I therefore disagree with the adoption of an undefined unconscionability standard in a field where predictability and reliance are so crucial.

¶62 Under the Restatement standard that I would apply, the judgment entered by the majority would still obtain. As the party seeking to challenge the enforceability of the liquidated damages clause in this case, Comcast bore the burden of demonstrating that the damages liquidated by the parties in this case were a reasonable forecast of the damages they anticipated at the time of the execution of the contract.[11] And Comcast utterly failed to carry its burden and thus should lose on that basis. Specifically, because Comcast failed to present any evidence of the nature of the damages anticipated by the parties or of the relationship the liquidated damages bore to those damages, its challenge to the liquidated damages clause in this case fails as a matter of law. I would affirm on that basis instead of altering our standard in a way that seems sure to undermine predictability in contracts in Utah and to inject arbitrariness into the judicial evaluation of liquidated damages clauses.

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[10] *See Morris v. Redwood Empire Bancorp*, 27 Cal. Rptr. 3d 797, 804 (Ct. App. 2005) ("An undefined standard of what is 'unfair' fails to give businesses adequate guidelines as to what conduct may be challenged and thus enjoined and may sanction arbitrary or unpredictable decisions about what is fair or unfair." (internal quotation marks omitted)).

[11] *See Bair*, 2001 UT 20, ¶¶ 25–26 ("[T]he party attempting to *avoid* the liquidated damages provision . . . . has the burden of proving that the liquidated damages clause was not a reasonable forecast of actual damages."); *Young Elec. Sign Co. v. United Standard W., Inc.*, 755 P.2d 162, 164 (Utah 1988) (same).